86 1573

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CONNER AIR LINES, INC.,
Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,
UNITED STATES SECRETARY OF TRANSPORTATION,
R. R. HAGDONE, Regional Counsel,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ARTHUR J. GAJARSA
MARK T. MCDERMOTT *
JOSEPH, GAJARSA, MCDERMOTT
& REINER, P.C.
Suite 400
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 331-1955
Attorneys for Petitioner

* Counsel of Record

GEORGE DEPOZSGAY
Suite 210
2950 S.W. 27th Avenue
Miami, Florida 33133
Of Counsel

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

I

Can a Federal agency escape liability for attorney fees and expenses under the Equal Access to Justice Act when it summarily suspends a company's operations without any rational basis in law or in fact?

II

Does a court having original and exclusive jurisdiction deny due process to an applicant under the Equal Access to Justice Act when it fails to issue an opinion or otherwise make any findings of fact or conclusions of law?

PARTIES

The caption contains the name of all parties to the proceeding in the court below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

STATUTES:

REGULATIONS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. ———

CONNER AIR LINES, INC.,
Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,
UNITED STATES SECRETARY OF TRANSPORTATION,
R. R. HAGDONE, Regional Counsel,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

On April 4, 1986, the United States Court of Appeals for the Eleventh Circuit granted the emergency motion of petitioner Conner Air Lines, Inc. ("Conner") for a stay of the emergency and summary suspension of Conner's air carrier operating certificate pending review on the merits. This order is reproduced in the Appendix at page 1a. On April 16, 1986, the Eleventh Circuit denied the motion of the respondent Federal Aviation Administration ("FAA") to dissolve the stay. This order is reproduced in the Appendix at page 2a.

On November 12, 1986, the Eleventh Circuit denied, without opinion, Conner's application for attorney fees

and expenses pursuant to the Equal Access to Justice Act. This order is reproduced in the Appendix at page 3a. On December 31, 1986, the Eleventh Circuit denied Conner's motion for reconsideration. This order is reproduced in the Appendix at page 4a.

On June 2, 1986, the National Transportation Safety Board ("NTSB") issued its opinion on review of the merits of the certificate suspension. The NTSB determined that the petitioner had not violated any of the Federal Aviation Regulations alleged by the FAA and that safety in air commerce or air transportation and the public interest did not require suspension of Conner's operating certificate. This decision is not reported and is reproduced in the Appendix at pages 5a-18a. On August 6, 1986, the NTSB denied the FAA's request for reconsideration.

JURISDICTION

This Court has jurisdiction by writ of certiorari under 28 U.S.C. § 1254(1) (1982) to review the November 12, 1986 order of the Court of Appeals denying attorney fees and the December 31, 1986 order of the Court of Appeals denying reconsideration.

STATUTES INVOLVED

1. 5 U.S.C. § 504 (1982 and Supp. III 1985).
2. 28 U.S.C. § 2412 (1982 and Supp. III 1985).
3. 49 U.S.C. § 1429(a) (1982 and Supp. III 1985).
4. 49 U.S.C. § 1485(a) (1982 and Supp. III 1985).

Because of their length, the pertinent portions of the above statutes are set forth in the Appendix at pages 19a-27a.

5. 49 U.S.C. § 1486(a) (1982 and Supp. III 1985):

> (a) Orders subject to review; petitions for review
>
> Any order, affirmative or negative, issued by the Board or Secretary of Transportation under this

chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

6. Equal Access to Justice Act, Pub. L. No. 96-481, § 202, 94 Stat. 2325 (1980):

SEC. 202. (a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.

(b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant, in certain situations.

(c) It is the purpose of this title—

(1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and

(2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the "American rule" respecting the award of attorney fees.

7. 14 C.F.R. § 121.81 (1986):

§ 121.81 Inspection authority.

(a) Each certificate holder shall allow the Administrator, at any time or place, to make any inspections or tests to determine its compliance with the Federal Aviation Act of 1958, the Federal Aviation Regulations, its operating certificate and operations specifications, or its eligibility to continue to hold its certificate.

(b) In the case of a supplemental air carrier or commercial operator, these inspections and tests include inspections and tests of financial books and records, except that the Administrator does not exercise this authority with respect to the financial books and records of a supplemental air carrier if the information sought can be obtained from the Civil Aeronautics Board.

8. 14 C.F.R. § 121.380(c) (1986):

(c) The certificate holder shall make all maintenance records required to be kept by this section available for inspection by the Administrator or any authorized representative of the National Transportation Safety Board (NTSB).

STATEMENT OF THE CASE

A. The Underlying Facts

Petitioner Conner Air Lines, Inc. ("Conner") is a certified air cargo carrier. It also owns and leases aircraft used for the transportation of air cargo. Its business is operated from and is based in Miami, Florida, at the Miami International Airport. Conner has been a certified air cargo transporter for approximately forty years. During this time period, respondent, the Federal Aviation Administration ("FAA"), has conducted numerous and various inspections of Conner's operations. Conner has always cooperated with the FAA. Recognizing its

legal responsibilities, Conner has complied with all governmental laws and regulations.

Without apparent reason, the FAA began to focus an unusual amount of attention on Conner in March of 1986. For example, on March 18, 1986, a FAA inspector demanded access to records pertaining to one of Conner's DC-8 aircraft which was "in storage" and had not been operated for more than twelve months. *See* Appendix at pages 10a-11a. The inspector made this demand although it was well known that the aircraft could not be operated due to a technological inability to meet the FAA's noise abatement requirements.

Conner questioned the need for an immediate inspection of the records of an "in storage" aircraft. The FAA decided that Conner was being uncooperative. Consequently, the FAA immediately subjected Conner to a full scale record inspection of all of Conner's records for all of its aircraft. The inspection was to be performed by a team of four inspectors. Although the FAA's reaction to the situation alarmed Conner, the company agreed to cooperate, and the inspection was scheduled for March 24, 1986.

Due to the unusual facts and circumstances surrounding the scheduling of the inspection, plus the fact that the inspection was to be conducted by four inspectors instead of the normal single inspector, Conner was reasonably concerned by the FAA's conduct. Conner believed that a reasonable way to protect the company's interest was to make an audio and video tape recording of the inspection process. Upon reviewing the matter with legal counsel, Conner was advised that the regulations did not restrict his ability to record the inspection process.

At approximately 9:00 a.m. on March 24, 1986, the FAA inspection team arrived at the Conner facility. They were advised by Conner that due to the unusual nature of the inspection, and Conner's concern about harassment by the FAA, the inspection process would

be recorded. Conner asked the inspection team leader if he had any objection to the recording. The team leader advised that he had no objection to taping, provided the FAA could also make a similar tape recording. The FAA did not, however, have an audio tape recorder. Therefore, Conner made one available to them. The inspection process commenced with Conner audio and video taping, while the FAA only audio taped. The inspection process continued unimpeded for approximately three hours until the FAA team of inspectors left at noon for lunch.

Upon the FAA inspectors' return from lunch at approximately 1:00 p.m. on March 24, 1986, the inspection team leader made an oral objection to the video taping. It is unclear what caused the FAA inspection team to raise this objection at that point in time. Conner was advised that the inspection process would be terminated unless the video taping was discontinued. Conner refused to discontinue the video taping. However, Conner did not impede the access of the FAA inspectors to the records in any manner. The FAA inspectors voluntarily elected to terminate their inspection, and they left the Conner facility.

The following day, March 25, 1986, a letter was hand delivered to Conner by the FAA which "respectfully requested that no taping (audio, video or any other form) be conducted while FAA inspectors are conducting FAA-related activities (inspection of aircraft records) on your premises." Conner replied that "we will in no way impede your inspection of aircraft records on our premises. On the other hand, we will protect ourselves by audio and video taping every possible moment you are on our premises."

On March 26, 1986, Conner was contacted by the FAA and was informed that the FAA would be sending Conner a "letter of investigation" regarding possible violations of the Federal Aviation Regulations resulting from Con-

ner's tape recording of the FAA inspection. This was the first notice to Conner that the FAA intended to equate an insistence on tape recording with a "refusal" to allow an inspection. This came as a shocking surprise to Conner. During Conner's 40 years of operation, the company had experienced no safety problems whatsoever. In addition, none of the recent flurry of inspection activity of Conner's facilities by the FAA had led to any allegations of regulatory violations. *See* Appendix at pages 12a-13a, n. 10 and n. 12.

Based upon the FAA's representation, Conner expected to receive a "letter of investigation" which would give Conner an opportunity to respond to the FAA's charges. Conner did receive a hand-delivered letter which arrived some time after 3:00 p.m. on March 26, 1986. The letter alleged that Conner had violated 14 C.F.R. § 121.81 and Section 609 of the Federal Aviation Act of 1958, 49 U.S.C. § 1429. In addition, the letter stated that the FAA would initiate "immediate enforcement action against your aircraft and air carrier operating certificate." At approximately 6:30 p.m. on March 26, 1986 (three hours after the so-called "letter of investigation" was delivered), the FAA hand-delivered an emergency order of suspension, which arbitrarily required Conner to immediately cease all operations.

B. The Stay By The Court Of Appeals

Due to the FAA's election to suspend Conner's certificate on an *emergency* basis, Conner had a right to immediate judicial review under 49 U.S.C. § 1486(a). Normally, FAA certificate actions are not issued on an emergency basis and the effect of the certificate action is stayed pending the normal appeal process before the NTSB. However, 49 U.S.C. § 1429(a) gives the FAA authority to declare an emergency and have the certificate action take immediate effect despite an appeal to the NTSB. Moreover, while the NTSB will review an

emergency case on its merits, the NTSB does not have jurisdiction to examine the propriety of the FAA's use of its emergency authority. *Nevada Airlines, Inc. v. Bond*, 622 F.2d 1017, 1020 n. 4 (9th Cir. 1980).

The FAA's decision to declare an emergency is a final administrative determination, not reviewable by the NTSB. The United States Courts of Appeals are the only avenue of redress for a company forced by the FAA to immediately cease operations. Faced with this situation, Conner simultaneously pursued its two available remedies. In addition to seeking review on the merits by the NTSB, Conner filed an emergency motion for a stay pending review with the United States Court of Appeals for the Eleventh Circuit.

Jurisdiction for the judicial relief sought by Conner on the emergency order lies with the United States Court of Appeals. *See* 49 U.S.C. § 1486(a). *See also, Nevada Airlines, Inc. v. Bond*, 622 F.2d 1017 (9th Cir. 1980). The standard of review is a stringent one. The party seeking judicial relief must show that the FAA decision to declare an emergency was a clear error of judgment lacking any rational basis in fact. *Id.* at 1021. Indeed, Conner knows of no prior case in which a court has stayed a FAA emergency action.

Conner's motion was granted by the court and Conner was allowed to continue operations during the NTSB review process. Moreover, the court reaffirmed its ruling when the court refused the FAA's request to dissolve the stay. The stay granted in Conner's case is the first time that a FAA emergency order has ever been stayed. Therefore, it can logically be concluded that the FAA's abuse of its emergency authority was of historic proportions. It clearly was error and lacked any rational basis in fact. As such, the FAA's action was not substantially justified.

C. The Proceedings Before The National Transportation Safety Board

The administrative review on the merits of the FAA's suspension action before the NTSB resulted in a reversal of the FAA's suspension order. The NTSB held that Conner "did everything that the cited [Federal Aviation Regulations] required it to do and nothing that any regulation proscribed it from doing." *See* Appendix at page 17a. The NTSB ruled that the FAA had no legal basis to suspend Conner's certificate. The FAA could not identify any statutes or regulations upon which it could justify its actions. The NTSB concluded that Conner's insistence on recording was the FAA's sole reason for issuing the emergency order of suspension and this insistence by Conner did not constitute a violation of any law or regulation. Consequently, its action declaring an "emergency" was not justified. Specifically, the NTSB stated:

> [Conner] gave the [FAA] full access to the requested records on the day the [FAA] scheduled for the inspection. *The regulations relied on by the [FAA] required no more.* In addition, the regulations as written do not circumscribe in any way what respondent can do on its own premises during the [FAA's] examination of its records. In this case *the [FAA] has attempted to rewrite the regulations and apply them retroactively* to prohibit [Conner] from doing something that was not expressly or by clear implication forbidden by the rules.

Appendix at page 15a (emphasis added).

D. The Application For Attorney Fees

Having prevailed on the merits of the action before the NTSB, as well as the Eleventh Circuit, Conner filed applications in both forums for the costs and attorney fees it incurred under the Equal Access to Justice Act.

28 U.S.C. § 2412 and 5 U.S.C. § 504 ("EAJA"). The application for attorney fees before the NTSB is pending. The application for attorney fees before the Eleventh Circuit was denied by the court on November 12, 1986. No opinion or findings were issued by the court. Conner's motion for reconsideration of that decision was denied by the court on December 31, 1986.

The FAA's response to the application for fees and expenses conceded that Conner is eligible under the EAJA to recover legal fees and costs; that Conner is a prevailing party as defined in the EAJA; and that Conner's challenge of the "emergency" designation before the Eleventh Circuit was a proceeding covered by the EAJA. The only defense raised by the FAA was that its position was "substantially justified" and that "special circumstances would make an award unjust." The Eleventh Circuit's summary decision denying attorney fees and costs to Conner does not include any findings of fact or conclusions of law. The lack of a written finding defining its reasons for the denial leaves Conner with imaginary assumptions as to the reasons why appropriate judicial relief was not granted as required by the EAJA.

BASIS FOR GRANTING THE WRIT

A. This Court's Power Of Supervision Is Required Because The Court Of Appeals Allowed The Agency To Escape Liability For Attorney Fees Even Though The Agency Summarily Suspended The Company's Operations Without Any Rational Basis In Law Or Fact

The FAA's suspension of Conner's operating authority could have been accomplished either on a regular basis or on an emergency basis. 49 U.S.C. § 1429(a). Had the FAA not elected to take the action on an emergency basis, the proceedings before the Court of Appeals which give rise to the petition to this Court would never have occurred. Ordinarily, certificate suspensions are auto-

matically stayed during the statutory administrative review process. This is not so if the FAA designates the action as an emergency.

> The filing of an appeal with the National Transportation Safety Board shall stay the effectiveness of the Secretary of Transportation's order unless the Secretary of Transportation advises the National Transportation Safety Board that an emergency exists.

49 U.S.C. § 1429(a). Consequently, Conner was forced to either cease operations or seek relief from the Court of Appeals. Thus, the attorney fees and expenses Conner seeks to recover would never have been incurred had the FAA not categorized its order as an emergency.

By granting a stay, the Court of Appeals concluded that the FAA had abused its emergency authority in that no emergency existed. For a court to reach this result, a carrier such as Conner "must demonstrate a substantial likelihood that the determination was a clear error of judgment lacking any rational basis in fact." *Nevada Airlines, Inc. v. Bond,* 622 F.2d 1017, 1021 (9th Cir. 1980).

The burden to be met for a stay is a heavy one. In fact, Conner is unaware of any prior case in which such a stay has been granted by any of the United States Courts of Appeals. In light of this, the granting of Conner's stay demonstrates that the FAA's use of its emergency authority here was so totally inappropriate that the Court of Appeals was able to recognize it as an immediately voidable action.

A cursory examination of the FAA's suspension order (Appendix at pages 6a-9a) reveals that no "emergency" existed. The order states that Conner refused to allow an examination of its records by insisting upon recording

the examination. No other emergency condition or safety problem existed. Life or limb was not in jeopardy.

The emergency authority granted the FAA by Congress confers upon the FAA plenary authority over certified carriers such as Conner. Congress specifically intended the authority to be used solely in serious safety-related circumstances when ". . . an emergency requiring immediate action exists in respect of safety in air commerce . . ." 49 U.S.C. § 1485(a). Emergency authority was never intended for any use other than to prevent an immediate risk to safety. It follows that the emergency authority cannot be used to prevent the video taping of a records inspection when such video taping does not interfere with that inspection.

Having been forced to expend monies litigating before the Court of Appeals due to the FAA's arbitrary use of its emergency authority, Conner sought reimbursement from the FAA by filing an application for attorney fees and expenses under the EAJA. In response to this application, the FAA conceded that Conner meets all of the prerequisites for an award of attorney fees under the EAJA. The FAA's opposition to Conner's application was based solely upon the contention that the agency's position was "substantially justified" and that "special circumstances" exist which would make it unjust for an award of fees and costs to be made under the circumstances. The court's November 12, 1986 ruling on the EAJA application and the court's December 31, 1986 denial of reconsideration do not provide any rationale whatsoever for the denial. Without knowing the court's reason for denying the EAJA application, Conner merely must presume that the court accepted the FAA's position that the agency's action was "substantially justified."

In the absence of a written opinion from the Court of Appeals giving its rationale, Conner can only proceed on the basis of the factual determinations made by the

NTSB in its detailed decision. Appendix at pages 5a-18a. The essence of the FAA's untenable position in the litigation before the court is exemplified by the FAA's lack of a legal or statutory basis for issuing the suspension order as an emergency order. The FAA gave no reason for the "emergency" designation other than what is contained in the order itself. It did not and could not proffer any statutory or regulatory justification for its actions. Neither 49 U.S.C. §§ 1429(a) and 1485(a) nor 14 C.F.R. §§ 121.81 and 121.380(c), which were the authorities cited by the FAA in its order, prohibited Conner's actions or could be used as a basis for the FAA's emergency order of suspension.

For purposes of determining whether the agency's position was substantially justified, the test is one of reasonableness, depending upon all of the pertinent facts in a given case. The essential issue of the reasonableness of the government's position must be evaluated, not only from the litigation position, but also from the totality of the circumstances in prelitigation and during trial. *Wolverton v. Heckler*, 726 F.2d 580 (9th Cir. 1984). *See also Donahue v. Heckler*, 600 F.Supp. 153 (D.C. Wisc. 1985).

It has been recently decided by the Court of Appeals for the District of Columbia Circuit that:

> A court in ruling on an EAJA application must determine whether the Government's "position" is "substantially justified." *This necessarily requires the court to examine through an EAJA prism both the Government's litigation position and the conduct that led to litigation.* After doing so, the court must then reach a judgment independent from that of the merits phase. The judgment is whether the Government's actions were slightly more than reasonable.

Federal Election Commission v. Rose, 806 F.2d 1081, 1090 (D.C. Cir. 1986) (emphasis added), *citing* 28 U.S.C. § 2412(d)(2)(D).

The court in *Rose* reasoned that an "arbitrary and capricious" label does not necessarily lead to the conclusion that the agency action was not "substantially justified." After noting that the "arbitrary and capricious" label is just a label, it went on to state that:

> By creating in EAJA a distinct legal standard—"substantially justified"—Congress has expressed its intent that after every sort of merits determination, including a determination that agency action descended to the depths of "arbitrary and capricious" conduct, the *court entertaining an EAJA application is obliged to reexamine the facts* under a different legal standard to determine whether that conduct is slightly more than reasonable.

Id. at 1089 (emphasis added).

The FAA's issuance of an emergency order entirely without color of authority and without any regulatory standard was not only unreasonable *per se*, but also premised on bad faith. For purposes of awarding attorney fees based upon bad faith on the part of the government, the bad faith may involve either the actions that led to the lawsuit or the conduct of the litigation. *McQuiston v. Marsh*, 707 F.2d 1082 (9th Cir. 1983). Here the FAA reacted to an action taken by Conner to preserve the record of what Conner perceived to be a bad faith inspection process. The FAA's response was a punitive action against Conner.

It would be difficult to conjure a more blatant abuse of statutory authority than that committed by the FAA in this case. This is exactly the type of abuse which Congress intended to prevent by enacting the EAJA. It was meant to be a deterrent against unreasonable and abusive governmental action. Specifically, Congress determined that:

> Certain individuals, partnerships, corporations and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.

Equal Access to Justice Act, Pub. L. No. 96-481, § 202 (a), 94 Stat. 2325 (1980).

The court assessing an EAJA application must deny with the clear abusive action of the agency beyond the pale of the law, serves to deprive Conner of the protection provided to it by Congress in the EAJA. To allow the type of abusive, punitive and vindictive action taken by the agency in this case would have a chilling effect on the goals and intent of the EAJA.

B. This Court's Power Of Supervision Is Required Because The Court Of Appeals Has Denied Conner Due Process By Failing To Issue An Opinion When Ruling On An Equal Access To Justice Act Application Where The Court Of Appeals Had Original And Exclusive Jurisdiction

When a court reviews an application filed pursuant to the EAJA, Congress intended that a discrete legal standard be applied and that an independent evaluation through an EAJA perspective be conducted. *Rose*, 806 F.2d at 1087. In *Rose*, the court specifically stated:

> The court assessing an EAJA application must deny costs and fees if, on the basis of this independent perspective, it concludes that the Government acted slightly more than reasonably, even though not in compliance with substantive legal standards applied in the merits phase. Only through a fresh look occasioned by application of the "substantially justified" standard can the court honor Congress' intent, manifest in the inclusion of this standard, not to permit a prevailing party automatically to recover fees.

Id. It is precisely the Eleventh Circuit's failure to conduct this independent evaluation in this case which denied Conner due process.

In *Matter of Esmond*, 752 F.2d 1106 (5th Cir. 1985), two individuals sought an award of attorney fees under the EAJA for fees they incurred in responding to and handling a meritless bankruptcy claim filed by a governmental agency. After recognizing that the government carries the burden of proving that its actions were substantially justified and reasonable, the court noted that there was nothing in the record to show that the governmental agency involved had met this burden because the agency had not filed any response to the EAJA application. The Fifth Circuit stated that "the bankruptcy court made no explicit finding of fact or ruling on why it was denying attorney's fees. Rather than infer a finding of substantial justification, considering the total lack of evidence regarding this issue, this Court remands to the bankruptcy court to give the parties an opportunity to present their evidence on this issue and have that court make a specific finding on this issue of whether the [governmental agency] was substantially justified in filing its [claim]." *Id.* at 1109. The circuit court's failure to make the necessary findings of fact similarly prevents this Court or any of the parties from making any inferences regarding the issue of substantial justification.

In *United States v. 341.45 Acres of Land*, 751 F.2d 924 (8th Cir. 1984), the court considered the applicability of the EAJA to a group of consolidated property condemnation cases. The Eighth Circuit recognized that the substantial justification of the government's position depended upon whether the government's refusal to offer more money to the property owners as just compensation had a reasonable basis in law and in fact. As the court held, "because we cannot determine from the record on appeal whether the government's position in each case was substantially justified, we remand the cases to the

district court for further proceedings. On remand the district court should determine whether the government's position was substantially justified by considering the totality of the circumstances [sic] prelitigation and during trial." *Id.* at 940. The district court's failure to make the appropriate findings of fact are what required the remand. Similarly, the Eleventh Circuit's failure to make specific findings of fact and conclusions of law in Conner's case also requires a remand.

The Eleventh Circuit itself has recognized the validity of this principle. In *National Treasury Employees Union v. Internal Revenue Service*, 735 F.2d 1277 (11th Cir. 1984), the court considered an application for attorney fees under the EAJA by a taxpayer. The underlying claim on the merits was settled by the parties and a consent agreement setting forth the terms of the settlement was approved by the district court. With regard to the EAJA application, the district court refused to award attorney fees because the settlement decree made no mention of fees and costs. On appeal, the Eleventh Circuit remanded the case to the district court for a determination of the controlling facts. The Eleventh Circuit specifically noted that "until the facts are fully developed either by an evidentiary hearing or a stipulation by the parties, neither of the parties is in a position to argue, nor is the court in a position to decide, the legal consequences which flow from the party's conduct in the case." *Id.* at 1279. The Eleventh Circuit further determined that the district court's failure to make the necessary findings of fact constituted an abuse of discretion. *Id.* at 1278.

Similarly, the Eleventh Circuit abused its discretion by only issuing a one-line summary denial of Conner's EAJA application. No findings of fact or conclusions of law were issued on the determination of whether or not substantial justification or special circumstances existed which would warrant the denial of the application. The

applicable standard to make findings of fact and conclusions of law cannot be applied differently because here the Eleventh Circuit, as opposed to a Federal district court, was the court of original jurisdiction for this matter.

CONCLUSION

For the reasons outlined above, the petition for the writ of certiorari should be granted or, in the alternative, the court should either remand to the circuit court for further proceedings or summarily reverse the circuit court's order.

Respectfully submitted,

ARTHUR J. GAJARSA
MARK T. MCDERMOTT *
JOSEPH, GAJARSA, MCDERMOTT & REINER, P.C.
Suite 400
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 331-1955
Attorneys for Petitioner

* Counsel of Record

GEORGE DEPOZSGAY
Suite 210
2950 S.W. 27th Avenue
Miami, Florida 33133
Of Counsel

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5213

CONNER AIR LINES, INC.,
Petitioner,

versus

FEDERAL AVIATION ADMINISTRATION,
UNITED STATES SECRETARY OF TRANSPORTATION,
R. R. HAGDONE, Regional Counsel,
Respondent.

On Petition for Review of an Order of
the Federal Aviation Administration

[Filed Apr. 4, 1986]

Before FAY, JOHNSON, and CLARK, Circuit Judges.

BY THE COURT:

Petitioner's emergency motion for stay pending review is GRANTED until further order of this Court. The stay is not to interfere with the scheduled administrative hearing.

Judge Johnson would deny the request for stay.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5213

CONNER AIR LINES, INC.,
Petitioner,

versus

FEDERAL AVIATION ADMINISTRATION,
UNITED STATES SECRETARY OF TRANSPORTATION,
R. R. HAGDONE, Regional Counsel,
Respondent.

Appeal from the United States District Court for
the Southern District of Florida

[Filed Apr. 16, 1986]

Before FAY, JOHNSON, and CLARK, Circuit Judges.

BY THE COURT:

Respondent's emergency motion to dissolve stay of the order of suspension is DENIED.

Judge Johnson would grant the motion and dissolve the stay.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5213

CONNER AIR LINES, INC.,
Petitioner,

versus

FEDERAL AVIATION ADMINISTRATION,
UNITED STATES SECRETARY OF TRANSPORTATION
and R. R. HAGDONE, Regional Counsel,
Respondents.

On Petition for Review of an Order of the
Federal Aviation Administration

[Filed Nov. 12, 1986]

Before: FAY, JOHNSON and CLARK, Circuit Judges.

BY THE COURT:

Petitioner's motion for attorney's fees and expenses pursuant to the Equal Access to Justice Act is denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5213

CONNER AIR LINES, INC.,
Petitioner,

versus

FEDERAL AVIATION ADMINISTRATION,
UNITED STATES SECRETARY OF TRANSPORTATION
and R. R. HAGDONE, Regional Counsel,
Respondents.

On Petition for Review of an Order of the
Federal Aviation Administration

[Filed Dec. 31, 1986]

Before: FAY, JOHNSON and CLARK, Circuit Judges.

BY THE COURT:

Petitioner's motion for reconsideration of this Court's Order of November 12, 1986, is denied.

SERVED: June 2, 1986

NTSB Order No. EA-2335

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
Washington, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 2nd day of June, 1986

Docket SE-7342

DONALD D. ENGEN, Administrator,
Federal Aviation Administration,
Complainant,

v.

CONNER AIR LINES, INC.,
Respondent,

OPINION AND ORDER

Respondent is appealing from the oral initial decision of Administrative Law Judge Joyce Capps, wherein she affirmed the Administrator's order suspending respondent's air carrier operating certificate and suspending the airworthiness certificate of its six aircraft.[1] The Ad-

---

[1] An excerpt from the hearing transcript containing the initial decision is attached.

ministrator's March 26, 1986, emergency[2] order of suspension reads in pertinent part as follows:

1. Conner Air Lines, Inc. holds Air Carrier Operating Certificate Number SO-268.

2. Conner Air Lines, Inc. is the owner or operator of the following aircraft, each of which is listed on the Conner Air Lines operations specifications:

Registration Number	*Aircraft Type*
N28CA	DC-6B
N37577	DC-6B
N162CA	DC-8-62
N53CA	DC-8-33
N163CA	DC-8-62
N614CA	DC-6A

3. On or about March 18, 1986, representatives of the FAA Administrator (hereinafter referred to as "the Administrator") attempted to conduct an inspection of civil aircraft N53CA.

4. As part of the inspection, the Administrator requested that the maintenance records of N53CA be produced for inspection.

5. F.A. Conner refused to allow the Administrator to review the records of N53CA.

6. On or about March 21, 1986, the Administrator delivered to F.A. Conner a letter dated March 20, 1986, which reads as follows:

   Pursuant to Federal Aviation Regulations 121.81 and 121.380(c), please make available the maintenance records on the following aircraft listed on

---

[2] On April 4, 1986, the United States Court of Appeals for the Eleventh Circuit stayed the emergency nature of the Administrator's order (No. 86-5213).

you [sic] Operations Specifications: N28CA, N37577, N162CA, N53CA, N163CA and N614CA.

Records should contain the following:

1. Aircraft Records
2. Inspection Records
3. Engine Records
4. Propeller Records
5. AD Records
6. Aircraft Flight Logs

Please be advised we will expect these records be made available at your facility for our inspection on March 24, 1986.

7. When the Administrator appeared at Conner Air Lines on March 24, 1986 to perform the above-described inspection, Conner Air Lines refused to allow the Administrator to conduct the inspection except in the presence of audio and videotape equipment during all phases of the inspection.

8. By letter dated March 25, 1986, Conner Air Lines was advised by the Administrator that the presence of audio and video taping equipment and the use of that equipment interfered with and obstructed the inspection being attempted, and Conner Air Lines was asked to remove that equipment so that the inspection could be conducted.

9. Upon receipt of the March 25 letter, Conner Air Lines refused to remove the video and audio recording equipment and advised the Administrator that the equipment would remain on during any inspection.

10. On or about March 26, Conner Air Lines was advised that refusal to remove the video and audio tap-

ing equipment constituted a refusal to allow the representatives of the Administrator to conduct his inspection.

11. The above-described actions of Conner Air Lines constitute refusal to permit the Administrator to conduct an inspection of the Airline and its aircraft.

12. As of this date, Conner Air Lines continues to refuse to permit the inspection of the Airline and its aircraft.

As a result of the foregoing, Conner Air Lines has violated and continues to violate the following sections of the Federal Aviation Regulations:

1. Section 121.81 by not allowing, and in fact refusing to the Administrator the right to make the inspections of Conner Air Lines and the aircraft on the operations specifications it has been issued under Part 121 of the Federal Aviation Regulations (FAR).

2. Section 121.380(c) by refusing to make the aircraft maintenance records required by Sections 121.380 of the Federal Aviation Regulations available to the Administrator for inspection.[3]

---

[3] Section 121.81 states in pertinent part:

"§ *121.81 Inspection authority.*

(a) Each certificate holder shall allow the Administrator, at any time or place, to make any inspections or tests to determine compliance with the Federal Aviation Act of 1958, the Federal Aviation Regulations, its operating certificate and operations specifications or its eligibility to continue to hold its certificate."

Section 121.380(c) states:

"*121.380 Maintenance recording requirements.*

* * * *

(c) The certificate holder shall make all maintenance records required to be kept by this section available for inspection by

NOW, THEREFORE, IT IS ORDERED, pursuant to the authority vested in the Administrator by Sections 609(a) and 1005(a) of the Federal Aviation Act of 1958, that Conner Air Lines' Air Carrier Operating Certificate No. 268 be, and hereby is, suspended for a period of five (5) days, said suspension to continue in force thereafter until Conner Air Lines permits the Administrator to conduct inspections in a free and uninterrupted manner, including the absence of video and/or audio taping of inspectors while conducting the inspections. In addition, IT IS ORDERED, that the airworthiness certificates of civil aircraft N28CA, N37577, N162CA, N53CA, N163CA and N614CA, be and hereby are,

suspended until such time as Conner Air Lines permits the Administrator to conduct inspections in a free and uninterrupted manner, including the absence of video and/or audio taping of inspectors while conducting the inspections, and to continue until the above described aircraft are determined by the Administrator to meet applicable airworthiness standards.[4]

In his brief, respondent contends that his "request" that the March 18, 1986, inspection be conducted on a subsequent day did not constitute a violation of the two FARs. Respondent also contends that the Administrator has failed to define a specific standard which puts operators on notice that the tape recording of inspections will result in punitive actions, and respondent's insistence on tape recording the March 24, 1986 inspections did not constitute a violation of the cited FARs. Finally,

---

the Administartor or any authorized representative of the National Transportation Safety Board (NTSB)."

[4] In editing her decision, the law judge changed the Administrator's order to add the requirement that respondent permit the Administrator to conduct unconditional inspections.

respondent argues that the law judge erred by basing her decision substantially on general policy considerations rather than on an analysis restricted to the facts relevant to whether respondent violated the FARs.

The Administrator has filed a reply brief opposing the appeal and urging affirmance of the initial decision.[5]

Upon consideration of the briefs of the parties and the entire record, the Board has determined that safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order.[6] We are reversing the law judge's findings that respondent violated the FARs by unobtrusively recording the Administrator's inspection of respondent's records at its place of business.

The facts in this case are largely undisputed. On March 18, 1986, Mr. Paul Franklin, an Assistant Principal Maintenance Inspector with the Miami Flight Standards District Office, performed a ramp inspection on N53CA, a DC-8 listed on respondent's Operations Specifications. Inspector Franklin noted several discrepancies during a visual inspection of the aircraft, concluded that the aircraft had been in storage for some time and was not being properly stored. Inspector Franklin was advised by Mr. Matthew Jablonowski, respondent's Director of Quality Control, that the aircraft was in storage because it did not have a noise

---

[5] The Administrator has filed an opposed motion to strike from respondent's appeal brief quotations from and references to FAA orders generally pertaining to enforcement and inspection matters. Neither the orders nor the quoted excerpts were offered in evidence at the hearing by respondent's attorneys, and they will not be considered on appeal. *Administrator* v. *Cunningham*, Order EA-2199, served July 31, 1985.

[6] Respondent's request for oral argument is denied. The issues have been thoroughly developed in the parties' briefs. 49 C.F.R. § 821.48(g).

exemption.[7] Mr. Jablonowski furnished Inspector Franklin records on this aircraft's current maintenance status, which reflected, among other things, that it had not been operated for months. Inspector Franklin did not suspect that respondent was going to operate N53CA, but he explained that aircraft identified on the Operations Specifications are to be maintained in an airworthy condition, which he did not believe was the case for N53CA. Inspector Franklin, therefore, asked to see the other maintenance records on the aircraft. Mr. Jablonowski was responsible for maintaining the records on respondent's aircraft but he directed Inspector Franklin to Mr. Conner, respondent's President and General Manager, who had the key to the lock which secured the additional records.

Inspector Franklin returned on the afternoon of March 18 and asked Mr. Conner for the records on N53CA. Mr. Conner questioned the purpose of this inspection, and Inspector Franklin told him that N53CA was not stored properly. Mr. Conner reiterated that the aircraft was grounded and stated that he knew of no regulation governing the storage of planes, but if Inspector Franklin would cite such a regulation, he would certainly comply with it.[8] Mr. Conner noted that respondent's manual which had been approved by the FAA only addressed returning stored aircraft to service, and Inspector Franklin felt that this provision was not enough. When Inspector Franklin asked Mr. Conner when would be a convenient time to see the records for N53CA, Mr. Conner responded "Never." After Inspector Franklin displayed his credentials and cited the regulations that authorized him to see the records, Mr. Conner replied "Next year."

---

[7] Noise rules are set forth in Subpart E of 14 C.F.R. 91 and 14 C.F.R. Part 36.

[8] Although Inspector Franklin testified that aircraft manufacturers usually provide storage procedures in their manuals, he was unable to find any storage requirements in the manual he had.

On March 19, Inspector Franklin along with another inspector again visited respondent's place of business. Mr. Conner stated that he could not produce the records because he did not have any available personnel to assist the inspectors,[9] and he agreed to provide the records on March 21. Inspector Franklin returned to his office and recommended to his supervisor that they expand the inspection to cover all records for all six of respondent's aircraft, reasoning that if N53CA was not being properly maintained the remaining aircraft might not be as well. By letter dated March 20, 1986, respondent was advised to make available on March 24 at its facility six categories of maintenance records for all six aircraft on its Operations Specifications. Mr. Conner not only agreed to the inspection but also welcomed it because respondent theretofore had always passed inspections.[10]

Before the inspection, Mr. Conner consulted an attorney who advised him that he had a right to tape the FAA inspection. When the FAA team of four inspectors arrived at respondent's premises on the morning of March 24, Mr. Conner told them that he intended to record the session. The team leader said that he had no objection and that he too would like to do the same thing. The team leader accepted Mr. Conner's offer of an audio recorder. Some of the team members noticed but paid little attention to a tripod-mounted video camera that was aimed at the front of the chairs that were lined up at the conference table they were using for the examina-

---

[9] The Administrator's Complainant does not rely on or cite these events on March 19.

[10] Mr. Conner testified without refutation by the Administrator that respondent had successfully completed two years under the National Air Transportation Inspection program, had been notified by the FAA in early March 1986 that its records and operations were in good shape and had been assured that it was not on the so-called hit list.

tion of the records.[11] Mr. Jablonowski periodically changed the tapes in the video and audio recorders in the presence of the inspectors. During the lunch break, the team leader learned that respondent may have been video taping the inspection, and when questioned, Mr. Conner readily admitted to having video taped the inspection. The team leader objected to the video recording—he did not want his face on respondent's film—and informed Mr. Conner that he was going to leave if Mr. Conner did not turn off the camera. Mr. Conner did not shut off the camera and the inspection team departed.[12]

The team leader's March 25 letter requested that respondent conduct no taping (audio or visual) while the team inspected the aircraft records on respondent's premises. Mr. Conner's March 25 written reply noted that respondent would in no way impede the FAA's inspection of aircraft records on its premises and that respondent would audio and video tape all of their activities.[13] This stalemate led to the March 26, 1986, emergency order of suspension.

The law judge in effect found that on March 18, 1986, respondent refused to allow the Administrator to review records of N53CA. There is support in the record for that view. It is uncontroverted that Inspector Franklin inspected some records on N53CA and asked Mr. Jablonowski for certain additional maintenance records on N53CA which Mr. Jablonowski said he did not have ac-

---

[11] The camera was located adjacent to a wall along the side of the table. (Ex. R-1.)

[12] The record does not disclose that the respondent's records which were examined on the morning of March 24 were not in order or reflected any violation or potential violation of the FARs.

[13] On March 25, the principal *operations* inspector assigned to respondent performed an inspection on respondent's premises. Mr. Conner had a conversation with this investigator but did not record his activities.

cess to, that Mr. Jablonowski referred Inspector Franklin to Mr. Conner for other records, and that Mr. Conner did not grant Inspector Franklin immediate access to those records. On the following day, however, Mr. Conner agreed to produce these records for Inspector Franklin. Mr. Conner's agreement the next day to produce the records, on Inspector Franklin's renewed request, strongly suggests that Mr. Conner did not intend, despite his literal language, to deny the inspector access to the records. In any event, it is clear that respondent's initial refusal to make available some maintenance records on the stored aircraft was not the basis for the emergency suspension order, and we will not impose any sanction for this violation. Mr. Conner readily agreed the following day to make the records available; the records pertained to a stored aircraft that had not been operated for months, was not being operated, and the inspector did not suspect that it was going to be operated; and before this aircraft could be returned to service, respondent would be required by its FAA-approved manual to perform certain procedures. Mr. Conner's initial refusal to produce the records on this stored aircraft also may have been prompted in part by Inspector Franklin's erroneous view that the manufacturer's manual for this aircraft contained guidelines on the storage of aircraft. The Administrator's emergency order of suspension was not precipitated by respondent's temporary denial of access to the records on N53CA but instead was precipitated by respondent's desire to audio and video tape the team inspection of the maintenance records for all its aircraft.

We turn now to the key issue and the heart of the Administrator's case, i.e., whether respondent's action in providing the Administrator with complete access to all of the requested records while insisting that the Administrator's inspection on its premises would be recorded was a refusal both to allow the inspection and to make

the records available. This issue presents a purely legal question of regulatory interpretation and application which has not been addressed by the Board in any case cited by the parties or which we have found.

Respondent gave the Administrator full access to the requested records on the day the Administrator scheduled for the inspection. The regulations relied on by the Administrator required no more. In addition, the regulations as written do not circumscribe in any way what respondent can do on its own premises during the Administrator's examination of its records. In this case, the Administrator has attempted to rewrite the regulations and apply them retroactively to prohibit the respondent from doing something that was not expressly or by clear implication forbidden by the rules. The "absence of a provision stating, or providing a basis for an unquestionable inference, that" certain conduct is proscribed warrants the reversal of the Administrator's order. *Pike* v. *C.A.B.*, 303 F.2d 353, 357 (8th Cir. 1962)

The fundamental purpose of requiring operators of aircraft to make records available for inspection is to enable the Administrator to see firsthand what the records reflect in order to determine that an operator is complying with, among other things, the FARs. The Administrator's ability to visually examine the contents of respondent's records was not impeded by respondent's use of recorders. Moreover, the Administrator does not take the position that the existing FARs empower him to oust an operator from any part of the operator's business establishment during a records inspection. The Administrator has not explained what additional intrusion the audio and video recording conducted herein would impose beyond the not unauthorized presence of the operator's representative while an inspection is in progress.[14]

---

[14] In affirming the Administrator's interpretation of §§ 121.81 and 121.380, the law judge relied on the Administrator's need to

In any event, the Administrator's own agents voiced no objection to respondent's audio taping the examination of records, and the fact that an experienced team leader consented to such a recording would at least suggest that the team was not being prevented from performing a meaningful inspection. To be sure, the inspectors testified that as a result of the audio recording they decided not to discuss their findings or conclusions until after they left respondent's premises, but this modification in their usual practice has more to do with how they conduct their investigations and not whether the records were there for them to inspect, the obligation imposed on the operator by the regulations at issue here.[15]

The Administrator's reliance on cases dealing with access to the observer's seat for en route inspections is misplaced. The regulations relevant to the cockpit access cases cited by the Administrator provide that "the inspector must be given free and uninterrupted access" to the cockpit (14 C.F.R. § 121.548) and "the forward observer's seat or the observer's seat selected by the Administrator must be made available". 14 C.F.R. § 121.581

---

have contemporaneous confidential discussions during a team inspection. But the Administrator has not put operators on notice that he would demand such confidentiality or that the failure to honor a request for such confidentiality would be enforceable through certificate action. The Administrator's counsel stated that the FAA could have removed the records from respondent's facility to the inspectors' offices, but he did not know why that was not done in this case. If the inspectors believed that audio or video taping would compromise their inspection, they had the alternative of taking the records with them in lieu of trying to resolve the impasse by resort to emergency certificate action.

[15] The inspectors expressed concern that the video camera could have been used to zero in on their notes. This is pure speculation. The Administrator apparently never requested a copy of the video tape to try to determine what it captured. The Administrator also failed to offer any evidence on the capability of the unmanned camera and did not interrogate respondent's witnesses on the ability of the camera to "read" notes.

(b). By failing to provide the observer's seat of choice to the inspector, the certificate holder was violating an express requirement of the regulation. *See, e.g., Administrator* v. *Crim*, 3 N.T.S.B. 2471 (1980). In this case, by contrast, respondent provided the Administrator with everything he was requested or required to produce, pursuant to a regulation which unlike § 121.548 does not contain the term "free and uninterrupted". In any case, there is no showing that the presence of the recording equipment precluded a "free and uninterrupted" inspection of records as purportedly required by the Administrator's order. Indeed, the law judge may not have been convinced of that either since she "edited" her decision to add language to the order specifying that the Administrator be permitted to conduct an "unconditional" inspection.

In short, respondent did everything that the cited FARs required it to do and nothing that any regulation proscribed it from doing. The Administrator's position that taping the inspections should not be permitted does not establish a violation of the regulations. *Pike v. C.A.B., supra.* We do not hold that an operator is free either to deny the Administrator access to its records or to physically interfere with an authorized inspection. Rather, we find that under the particular facts of this case the respondent's actions did not prevent or obstruct the Administrator's inspection of its records. Moreover, to the extent that this proceeding reflects an overreaction on both sides of the inspection issue, we do not condone the conduct of either party. The Administrator has an important function to perform in insuring aviation safety and the regulated industry should, and can be made to, cooperate in reasonable efforts by the Administrator to discharge his functions. If the Administrator believes that it is essential to bar the recording of inspections, he may wish to consider promulgating a regulation or taking any other appropriate action specifying the activities he intends to proscribe.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal be and it hereby is granted; and
2. The Administrator's order of suspension and the initial decision be and they hereby are reversed.

GOLDMAN, Acting Chairman, LAUBER, and NALL, Members of the Board, concurred in the above opinion and order. BURNETT, Member of the Board, did not participate.

STATUTES

5 U.S.C. § 504

§ 504. Costs and fees of parties

(a) (1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

(3) The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.

(b) (1) For the purposes of this section—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.);

(B) "party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partner-

ship, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association, as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;

(C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, and (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607);

(D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication; and

(E) "position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based; except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings.

(2) Except as otherwise provided in paragraph (1), the definitions provided in section 551 of this title apply to this section.

28 U.S.C. § 2412

§ 2412. Costs and fees

(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

* * * *

(d) (1) (A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial

review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(2) For the purposes of this subsection—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing

market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978;

(F) "court" includes the United States Claims Court;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement; and

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government.

49 U.S.C. § 1429(a)

§ 1429. Reinspection or reexamination; amendment, suspension, or revocation of certification

(a) Procedure; notification; hearing; appeal to National Transportation Safety Board; judicial review

The Secretary of Transportation may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Secretary of Transportation, he determines that safety in air commerce or air transportation and the public interest requires, the Secretary of Transportation may issue an

order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate (including airport operating certificate), or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Secretary of Transportation shall advise the holder thereof as to any charges or other reasons relied upon by the Secretary of Transportation for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Secretary of Transportation under this section may appeal the Secretary of Transportation's order to the National Transportation Safety Board and the National Transportation Safety Board may, after notice and hearing, amend, modify, or reverse the Secretary of Transportation's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Secretary of Transportation's order. In the conduct of its hearings the National Transportation Safety Board shall not be bound by findings of fact of the Secretary of Transportation. The filing of an appeal with the National Transportation Safety Board shall stay the effectiveness of the Secretary of Transportation's order unless the Secretary of Transportation advises the National Transportation Safety Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the National Transportation Safety Board shall finally dispose of the appeal within sixty days after being so advised by the Secretary of Transportation. The person substantially affected by the Na-

tional Transportation Safety Board's order may obtain judicial review of said order under the provisions of section 1486 of this title, and the Secretary of Transportation shall be made a party to such proceedings.

49 U.S.C. § 1485(a)

§ 1485. Orders, notices, and service

(a) Effective date of orders; emergency orders

Except as otherwise provided in this chapter, all orders, rules, and regulations of the Board or the Secretary of Transportation shall take effect within such reasonable time as the Board or Secretary of Transportation may prescribe, and shall continue in force until their further order, rule, or regulation, or for a specified period of time, as shall be prescribed in the order, rule, or regulation: *Provided,* That whenever the Secretary of Transportation is of the opinion that an emergency requiring immediate action exists in respect of safety in air commerce, the Secretary of Transportation is authorized, either upon complaint or his own initiative without complaint, at once, if he so orders, without answer or other form of pleading by the interested person or persons, and with or without notice, hearing, or the making or filing of a report, to make such just and reasonable orders, rules, or regulations, as may be essential in the interest of safety in air commerce to meet such emergency: *Provided further,* That the Secretary of Transportation shall immediately initiate proceedings relating to the matters embraced in any such order, rule, or regulation, and shall, insofar as practicable, give preference to such proceedings over all others under this chapter.